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IN THE COURT OF APPEALS OF INDIANA

HARRY HARRISON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 48A02-0605-CR-437
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Thomas Newman, Jr., Judge
Cause No. 48D03-0510-FB-476

March 15, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

Harry Harrison appeals his sentence for possession of a firearm by a serious violent felon as a class B felony.[1] Harrison raises two issues, which we revise and restate as whether Harrison's sentence is inappropriate. We affirm.

The relevant facts follow. On October 6, 2005, Harrison possessed a handgun and delivered or sold it to William McLaughlin. Harrison gave contradictory statements to law enforcement and eventually acknowledged to having had the handgun in his possession for a period of time. Harrison had previously been convicted of child molesting as a class C felony on May 19, 1994. The State charged Harrison with: (1) Count I, receiving stolen property as a class D felony;[2] (2) Count II, failure to register as a sex offender as a class D felony;[3] (3) Count III, unlawful possession of a firearm by a serious violent felon as a class B felony; and (4) Count IV, being an habitual offender.[4] Harrison pleaded guilty to unlawful possession of a firearm by a serious violent felon as a class B felony, and the State dismissed the remaining charges.

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[1] Ind. Code § 35-47-4-5 (2004).

[2] Ind. Code § 35-43-4-2 (2004).

[3] Ind. Code §§ 5-2-12-8; -9 (2004) (Repealed by Pub. L. No. 140-2006, § 41 (eff. July 1, 2006); and Pub. L. No. 173-2006, § 55 (eff. July 1, 2006)). See now Ind. Code §§ 11-8-8-1 to 11-8-8-17 (Supp. 2006).

[4] Ind. Code § 35-50-2-8 (Supp. 2005).

The trial court found no mitigators and found Harrison's criminal history as an aggravator. On April 10, 2006, the trial court sentenced Harrison to twenty years in the Indiana Department of Correction.

I.

The sole issue is whether Harrison's sentence is inappropriate. Harrison argues that his sentence is inappropriate and that the trial court failed to consider the following alleged mitigating factors: (A) his guilty plea; (B) his drug addiction; and (C) his remorse. Harrison also argues that the trial court failed to consider alternatives to incarceration.

Ind. Appellate Rule 7(B) provides that we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Under this rule, the burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

We note that Harrison's offense was committed after the April 25, 2005, revisions of the sentencing scheme.[5] Even assuming, without deciding, that our analysis under the

[5] Indiana's sentencing scheme was amended effective April 25, 2005, to incorporate advisory sentences rather than presumptive sentences. See Ind. Code § 35-50-2-5 (Supp. 2005). Under the amended sentencing scheme, trial courts "may impose any sentence that is . . . authorized by statute . . . and . . . permissible under the Constitution of the State of Indiana . . . regardless of the presence or absence of aggravating circumstances or mitigating circumstances." Ind. Code § 35-38-1-7.1(d) (Supp. 2005).

revised sentencing statutes incorporates a review of aggravators and mitigators,[6] we conclude that the trial court did not abuse its discretion by failing to assign weight to Harrison's proposed mitigators.

"The finding of mitigating factors is not mandatory and rests within the discretion of the trial court." O'Neill v. State, 719 N.E.2d 1243, 1244 (Ind. 1999). The trial court is not obligated to accept the defendant's arguments as to what constitutes a mitigating factor. Gross v. State, 769 N.E.2d 1136, 1140 (Ind. 2002). "Nor is the court required to give the same weight to proffered mitigating factors as the defendant does." Id. Further, the trial court is not obligated to explain why it did not find a factor to be significantly mitigating. Sherwood v. State, 749 N.E.2d 36, 38 (Ind. 2001), reh'g denied. However, the trial court may "not ignore facts in the record that would mitigate an offense, and a failure to find mitigating circumstances that are clearly supported by the record may imply that the trial court failed to properly consider them." Id. An allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record. Carter v. State, 711 N.E.2d 835, 838 (Ind. 1999).

A. Guilty Plea

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[6] See Anglemyer v. State, 845 N.E.2d 1087, 1091 (Ind. Ct. App. 2006) (holding that "[e]ven if an error relating to the trial court's finding of aggravating and mitigating circumstances occurs, under Indiana Code Section 35-38-1-7.1(d) we submit that any error is harmless"), trans. granted; and McMahon v. State, 856 N.E.2d 743, 748 (Ind. Ct. App. 2006) (concluding that "[e]ven under the new statutes, an assessment of the trial court's finding and weighing of aggravators and mitigators continues to be part of our review on appeal"), trans. not sought. See also Windhorst v. State, 858 N.E.2d 676 (Ind.

We first consider Harrison's proposed mitigator that he pleaded guilty. The trial court did not specifically identify Harrison's guilty plea as a mitigating factor. Indiana courts have recognized that a guilty plea is a significant mitigating circumstance in some circumstances. Trueblood v. State, 715 N.E.2d 1242, 1257 (Ind. 1999), reh'g denied, cert. denied, 531 U.S. 858, 121 S. Ct. 143 (2000). Where the State reaps a substantial benefit from the defendant's act of pleading guilty, the defendant deserves to have a substantial benefit returned. Sensback v. State, 720 N.E.2d 1160, 1164 (Ind. 1999). However, a guilty plea is not automatically a significant mitigating factor. Id. at 1165.

For example, in Sensback, the defendant argued that her guilty plea showed "acceptance of responsibility." Id. at 1164. However, the State argued that she received her benefit due in that the State dropped the robbery and auto theft counts in exchange for her guilty plea to the felony murder charge. Id. at 1165. The Indiana Supreme Court agreed with the State that the defendant "received benefits for her plea adequate to permit the trial court to conclude that her plea did not constitute a significant mitigating factor." Id.

Here, Harrison received significant benefits from his guilty plea. In exchange for his guilty plea, the charges of receiving stolen property as a class D felony, failure to register as a sex offender as a class D felony, and being an habitual offender were dismissed. Thus, rather than facing a maximum possible sentence of fifty-six years,

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Ct. App. 2006) (disagreeing with McMahon, 856 N.E.2d 743), trans. granted.

Harrison faced a maximum sentence of twenty years. See Ind. Code §§ 35-50-2-5; 35-50-2-7 to -8 (Supp. 2005). Thus, Harrison received a significant benefit from his guilty plea, and the trial court did not abuse its discretion by not identifying Harrison's guilty plea as a mitigating factor. See Sensback, 720 N.E.2d at 1164-1165.

B. Drug Addiction

Harrison argues that the trial court should have considered his drug addiction as a mitigating circumstance. At sentencing, the following exchange occurred between defense counsel and Harrison:

> Q Were you doing some of this to feed a drug habit?
> A Yeah. It was all to feed a drug habit.
>
> * * * * *
>
> Q You do have a rather lengthy criminal history. Have you ever been through any sort of drug treatment program or been evaluated?
> A I've been - - that was years ago in - - I can't remember everything about it. I've been trying to get help, it just seems like I don't have the money to and I don't have insurance and I can't get it.
> Q This shows, unless I'm reading it incorrectly that you did have some sort of drug evaluation, psychiatric evaluation, back in 1987, do you think you've had anything since then?
> A No, I haven't.

Transcript at 50. The State points out that the presentence investigation report states that Harrison stated that the "last time he used [drugs] was about three years ago." Appellant's Appendix at 20. The presentence investigation report also states, "As far as [Harrison's] attitude toward his use, he stated, 'I don't think about it.'" Id. We cannot say that Harrison has established that the mitigating evidence is both significant and

clearly supported by the record. Accordingly, we cannot say the trial court abused its discretion by not finding Harrison's addiction to be a mitigating circumstance. See, e.g., Iddings v. State, 772 N.E.2d 1006, 1008 (Ind. Ct. App. 2002) (holding that the trial court properly weighed aggravators and mitigators and noting that some trial courts find substance abuse to be an aggravator), trans. denied; Simmons v. State, 717 N.E.2d 635, 641 (Ind. Ct. App. 1999) (holding that the trial court did not err when it gave little weight to defendant's alcoholism as a mitigator).

C. Remorse

Harrison argues that the trial court abused its discretion by failing to consider his remorse as a mitigator. At the sentencing hearing, Harrison stated:

> I understand that what I did was wrong, Your Honor. And to the victims and I apologize to them. I know that I've been in a lot of trouble throughout my life and it's just sometimes, I don't know, I guess I get caught up. This time that I got this gun case, I kind of wish I didn't have it, because I don't know, it's just got me all bent out shape. [sic] I really don't want to go back to prison, but I know I'm gonna have to. I'm just hoping the court can show me a little bit of leniency on this. I do apologize to the victims that's [sic] here today.

Transcript at 49-50. A trial court's determination of a defendant's remorse is similar to a determination of credibility. Pickens v. State, 767 N.E.2d 530, 534-535 (Ind. 2002). Without evidence of some impermissible consideration by the court, we accept its determination of credibility. Id. The trial court is in the best position to judge the sincerity of a defendant's remorseful statements. Stout v. State, 834 N.E.2d 707, 711 (Ind. Ct. App. 2005), trans. denied. Harrison does not allege any impermissible

considerations. Although Harrison expressed remorse, it was up to the trial court to determine whether that remorse was genuine and significant. We cannot say his remorse is both significant and clearly supported by the record. The trial court did not abuse its discretion by not finding Harrison's alleged remorse to be a mitigating factor. See, e.g., id. (holding that the trial court did not err by refusing to find defendant's alleged remorse to be a mitigating factor).

D. Alternatives to Incarceration

Harrison argues that the trial court abused its discretion when it failed to consider alternatives to incarceration. Consideration and imposition of alternatives to incarceration is a "matter of grace" left to the discretion of the trial court. Million v. State, 646 N.E.2d 998, 1001-1002 (Ind. Ct. App. 1995). According to the presentence investigation report, in June 1985, Harrison petitioned for treatment in Richmond State Hospital in lieu of prosecution for two counts of burglary as class C felonies and was transported to Richmond State Hospital, but he "separated" from the hospital. Appellant's Appendix at 16. Based on Harrison's extensive criminal history, and previous failed treatments, we cannot say that the trial court abused its discretion by sentencing Harrison to incarceration. See Wolf v. State, 793 N.E.2d 328, 330 (Ind. Ct. App. 2003) (holding that the trial court did not abuse its discretion based on defendant's extensive criminal history, her previous failure at in-home detention, and the facts of the current crimes).

In summary, the trial court did not abuse its discretion by not finding Harrison's proposed mitigators. We now turn to a review of the nature of the offense and the character of the offender. Our review of the nature of the offense reveals that Harrison, a serious violent felon, possessed a handgun and delivered or sold it to William McLaughlin. Harrison gave contradictory statements to law enforcement and eventually acknowledged to having the handgun in his possession for a period of time.

Our review of the character of the offender reveals an extensive criminal history. Harrison's juvenile history consists of adjudications for burglary and theft. Harrison's adult criminal history consists of convictions for escape, criminal mischief, felonious assault, child molesting as a class C felony, criminal recklessness as a misdemeanor, auto theft as a class D felony, theft, and five convictions for burglary as class C felonies. The presentence investigation report states that Harrison "does not do very well on probation. Most, if not all, of his causes resulted in probation violations and revocation of the suspended sentence." Appellant's Appendix at 21. After due consideration of the trial court's decision, we cannot say that the sentence imposed by the trial court is inappropriate in light of the nature of the offense and the character of the offender. See, e.g., Weiss v. State, 848 N.E.2d 1070, 1073 (Ind. 2006) (holding that the defendant's sentence for dealing methamphetamine and unlawful possession of a firearm by a serious violent felon was not inappropriate).

For the foregoing reasons, we affirm Harrison's sentence for possession of a firearm by a serious violent felon as a class B felony.

Affirmed.

SULLIVAN, J. and CRONE, J. concur